Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1212

In The

Supreme Court of the United States

October Term, 1996

JEFFREY L. PEITZMEIER and SHERRY L. PEITZMEIER,

Petitioners,

vs.

HENNESSY INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is denial of the Petition warranted because there has been insufficient opportunity for the lower courts and commentators to consider the scope of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to resolve intracircuit conflicts?

2. In light of the fact that the district court's grant of summary judgment in Hennessy's favor was based on independent grounds, is this case an appropriate vehicle for resolution of the perceived conflict over *Daubert's* meaning?

3. Did the lower courts properly apply *Daubert* to exclude the unreliable expert testimony proffered by petitioners?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Hennessy Industries, Inc. states that it is wholly owned by DH Holdings Corporation, which in turn is wholly owned by Danaher Corporation, and that Danaher Corporation has no parent company. Hennessy Industries, Inc. has no non-wholly owned subsidiaries.

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Respondent Hennessy Industries, Inc. ("Hennessy") respectfully opposes the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed October 4, 1996 (Pet. App. 1a-14a), is reported at 97 F.3d 293. The opinion and order of the United States District Court for the District of Nebraska, filed April 14, 1995 (Pet. App. 16a-22a), is unreported.

STATEMENT OF THE CASE

This is a products liability case arising out of an accident which occurred when petitioner Jeffrey Peitzmeier ("Peitzmeier") was struck in the face and head by a tire which exploded while he was changing it on a tire changing machine ("tire changer") manufactured by Hennessy. The tire changer did not cause the tire to explode; rather, the explosion was caused by Peitzmeier's over-inflation of a tire which he was trying to mount on a wheel rim that was too large for the tire. Peitzmeier was not struck by any part of the tire changer.

A. Proceedings Below

Petitioners sued Hennessy in the United States District Court for the District of Nebraska. They alleged that the tire changer was defective in design and that the defect enhanced Peitzmeier's injuries.

In a failed attempt to prove these claims, petitioners ventured to Tucson, Arizona for the "expert" advice of Alan L. Milner ("Milner"), a metallurgist with no expertise in mechanical engineering, machine design, or biomechanics. Milner opined that the tire changer's design was improper in two respects: (1)

Two of its features were defective; and (2) it lacked devices which would have prevented the accident. The two allegedly defective features were (i) the machine's platform, which allegedly acted as a "launch pad" for the exploding tire; and (ii) the machine's clamps, which failed to "restrain" the exploding tire. The "safety devices" which Milner found lacking — none of which he had ever designed, built, tested, or even illustrated — were (i) a device to limit the amount of air pressure that the operator could put in the tire; (ii) a "restraint" system; (iii) an "interlock" system to prevent the operator from inflating the tire unless a "restraint system" was in place; and (iv) a mirror or other means by which the operator could "inspect" the underside of the tire during inflation. (C.A. App. 347-48). Milner also opined that the tire changer was equipped with inadequate warnings and instructions. (C.A. App. 347).

Hennessy moved for summary judgment on a number of independent grounds. First, Hennessy contended that petitioners' contention that the tire changer was defective was at odds with the language and policy of § 402A of the Restatement (Second) of Torts, which has been adopted in Nebraska and establishes a cause of action in strict products liability. Second, Hennessy argued that even if such an action were available to petitioners, they had failed to establish its necessary predicates because they had no admissible proof of either (i) a defective and unreasonably dangerous product; or (ii) a causal link between a tire changer defect and Peitzmeier's injuries; or (iii) that any warning would have avoided the accident. Finally, Hennessy argued that Milner's opinions could not overcome the deficiencies in petitioners' case because his testimony was inadmissible under Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The district court granted the motion for summary judgment

and dismissed the complaint. (Pet. App. 20a-22a). The court held that Milner's testimony was not admissible, that the tire changer was not defective as a matter of law, and that the proximate cause of the accident was operator error. (Pet. App. 20a).

The court of appeals found that the district court had not abused its discretion in excluding Milner's testimony and affirmed the district court's grant of summary judgment. (Pet. App. 8a-9a). That court, however, did not reach the other grounds advanced by Hennessy in support of the grant of summary judgment.

B. Correction of Misstatements in the Petition

The opinion of the court of appeals correctly sets forth the facts of the case. Pursuant to United States Supreme Court Rule 15.1, Hennessy brings the following misstatements of fact contained in the Petition to the Court's attention.

Petitioners assert that Hennessy contended in its motion for summary judgment that Milner's testimony was inadmissible for the sole reason that it was unreliable under *Daubert*. That is not true. In addition to demonstrating the unreliability of Milner's testimony, Hennessy set forth at length Milner's lack of qualifications in mechanical engineering, machine design, and biomechanics under Rule 702. The district court enumerated Milner's lack of qualifications in those areas as part of its decision to exclude his testimony. (Pet. App. at 19a).

Petitioners also misinform the Court of the reasoning underlying the district court's grant of summary judgment. Contrary to petitioners' argument that the district court relied solely on the inadmissibility of Milner's opinions under *Daubert*, at least ***seven other grounds*** supported the court's ruling independent of the exclusion of Milner's testimony: (1) the tire

changer did not cause "the explosion or the accident"; (2) the tire changer was "not defective as a matter of law" because it was "safe for its intended use"; (3) the tire changer was "not unreasonably dangerous" because its purpose was "not to prevent a tire from exploding" and because it merely "acted as a passive surface against which the tire/wheel reacted when it exploded"; (4) the crashworthiness or enhanced injury theory of liability did not apply to the case; (5) there was inadequate evidence of injury enhancement, since there was "no evidence that if a different design had been used Peitzmeier's injuries would have been reduced"; (6) Hennessy had "no duty to warn"; and (7) any lack of warning was not the cause of Peitzmeier's injuries. (Pet. App. 20a-21a). *Each* of these rulings of the district court, somehow overlooked by petitioners, provide independent bases for summary judgment unrelated to the *Daubert* ruling.

Petitioners also misrepresent the scope of Milner's opinions and testimony. They argue that, in a "rush to apply the *Daubert* reliability factors," both courts below looked "exclusively at those parts of [Milner's] testimony relating to alternative designs and their feasibility." Petition at 9.

That incorrect statement is central to petitioners' argument, for they contend that, under Nebraska law, Milner's testimony on alternative designs was not necessary to establish the existence of a design defect. Petition at 8-9. Thus, they claim that Milner's testimony about the lack of specific devices was not offered as part of his design defect opinion, but rather, "was elicited by petitioners as a response to Respondents' expected 'state of the art' defense under Nebraska law." Petition at 9, n. 4. Thus, the argument runs, the exclusion of Milner's testimony would not have justified summary judgment.

Unfortunately, that revisionist history contradicts Milner's unambiguous testimony. At deposition, Milner testified that the

absence of his proposed safety devices was the ***reason why the tire changer was defective***:

> (Mr. Mullady):
>
> Q. Sir, is it your opinion in this case that the Coats model RC20AA tire-changing machine being used by Mr. Peitzmeier on the date of the accident was a defective product?
>
> A. Yes, sir.
>
> Q. Why was it defective?
>
> A. Well, it was defective for a number of design reasons. It was defective because it has a method of supporting the tire/wheel assembly in its operating position, which represents an efficient launching platform situation. It *has no means of restraining the tire/wheel assembly in place* on the platform or tabletop. And it *has no inflation interlock system.* And it *has no pressure limitation and direct pressure reading inflation system* attached to it. I think those are the primary design considerations that come to mind.

(C.A. App. 346-47) (emphasis added). In short, Milner testified that the changer was defective because it lacked the components of his alternative design. It is not surprising that petitioners have attempted to rewrite their witness's testimony.

REASONS FOR DENYING THE WRIT

This is not a difficult case. In *Daubert*, this Court held that the trial judge should act as a "gatekeeper" to ensure that expert scientific testimony is admitted only if is relevant and reliable. The district court in this case properly exercised its gatekeeping function. It examined Milner's qualifications and the methodology underlying his opinions and found that the proffered testimony lacked reliability. For that and other reasons, the district court granted summary judgment against petitioners. In short, this case presents merely a routine application of *Daubert* to the unreliable opinions of an unqualified expert in a products liability case.

Nevertheless, petitioners have sought review in this Court. They have attempted to dress up this run-of-the-mill gatekeeping case as presenting a conflict among the circuits. That it does not.

Petitioners assert that the courts of appeal are "inextricably entrenched" in disagreement over the meaning of *Daubert*. Petition at 7. In articulating this conflict, petitioners rely principally on two decisions issued by panels in the Second and Tenth Circuits in support of the proposition that the *Daubert* reliability requirement does not apply to expert engineering testimony, on the grounds that such testimony is not "scientific" or that it is not based on any particular methodology. That claimed interpretation, they contend, runs afoul of decisions issued by the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have applied the *Daubert* reliability requirement more broadly.

In making this argument, however, petitioners have ignored subsequent decisions issued by other panels in the Second and Tenth Circuits which do not support their characterization of a

conflict between the circuit courts. At most, *intra*circuit conflicts exist in the Second and Tenth Circuits which require resolution by those courts rather than by this Court.

Moreover, any conflict among panels on the same circuit shows that this issue has not sufficiently "percolated" to warrant this Court's revisiting *Daubert*. Although the lower courts have strongly supported the ruling of the Eighth Circuit in this case, the confusion, if any, in the Second and Tenth Circuits merely suggests that more time is needed for the lower courts and commentators to digest *Daubert* before it returns to this Court for clarification.

In any event, this case provides a poor vehicle for a further interpretation of *Daubert*. Petitioners portray this case as hinging on the appropriateness of the district court's exclusion of Milner's testimony as unreliable under *Daubert*. That portrayal, however, ignores the several independent grounds relied upon by the district court in granting summary judgment to Hennessy. The presence of those independent factors means that this Court's review on the basis of *Daubert* would be an empty gesture. Petitioners have not sought review of those grounds in this Court, and none of them presents issues of federal law warranting this Court's review.

Finally, Milner's testimony was properly excluded under *Daubert*. Quite simply, Milner lacked the training and experience to opine as an expert in tire changers and failed to adhere to "the same standards of intellectual rigor that are demanded in his or her professional work." *Tyus v. Urban Search Management*, 102 F.3d 256, 262 (7th Cir. 1996).

I.

IT WOULD BE PREMATURE TO REVISIT *DAUBERT* BECAUSE THE LOWER COURTS HAVE NOT HAD SUFFICIENT OPPORTUNITY TO CONSIDER ITS SCOPE.

Petitioners implicitly assert that neither the Second nor Tenth Circuits would have excluded Milner's testimony under *Daubert*. They base their argument primarily on one case from each Circuit.

• **The Second Circuit.** Petitioners assert that the Second Circuit in *Iacobelli Construction v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994), "refused to apply the *Daubert* factors to proffered testimony of geotechnical consultants in a construction contract case." Petitioners overstate the Second Circuit's discussion of *Daubert*. In *Iacobelli*, the district court in granting summary judgment had rejected the affidavits of a geotechnical consultant and an underground construction consultant as conclusory and for failing to articulate how the conclusions were reached, apparently relying on *Daubert*. Reversing the grant of summary judgment, the Second Circuit found the district court's "reliance on *Daubert* misplaced" and in elaboration stated that the affidavits

> do not present the kind of "junk science" problem that *Daubert* meant to address. *See Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993) (Daubert "specifically dealt with the admissibility of scientific evidence"). Rather, they rely upon the type of methodology and data typically used and accepted in construction litigation cases.

Id. at 25. That review of the methodology (especially the finding that it was "typical[ ]"), along with the conclusion that "junk science" was not involved, does not present the clear conflict with the other circuits that petitioners describe. The Second Circuit merely found on the facts before it that the district court had not properly performed its "gatekeeping" function.

Moreover, petitioners ignore what the Second Circuit actually did a year later in *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995). In *McCullock*, the defendant argued that the testimony of a "consulting engineer" should have been excluded under *Daubert* because it lacked grounding in science. Affirming the decision to admit the testimony, the Second Circuit found that the testimony "easily qualifie[d] for admission under *Daubert*." *Id.* at 1043. The court reviewed numerous aspects of the methodology used by the expert to reach his opinion in finding his testimony properly admitted. *Id.* Contrary to the premise underlying the Petition here, the Second Circuit applied *Daubert* to "non-scientific" expert testimony (specifically identified as "specialized knowledge") in *McCullock*. Thus, the support that petitioners seek from the Second Circuit to create a conflict over the application of *Daubert* to non-scientific expert testimony is illusory.

• **The Tenth Circuit.** Petitioners also rely on the Tenth Circuit's decision in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996). *Compton* involved the testimony of a mechanical engineer who opined that the roof support structures in a car were defective because they permitted excessive roof crush in a rollover. The Tenth Circuit held that *Daubert* did not apply because the witness had not relied upon any particular methodology, but reached his opinions by relying upon general engineering principles and concepts. *Id.* at 1519-20.

Three months later, the Tenth Circuit issued its decision in

Duffee v. Murray Ohio Mfg. Co., 91 F.3d 1410 (10th Cir. 1996), a products liability case involving an alleged defective bicycle brake. In affirming the grant of summary judgment because the testimony of an engineer was unreliable under *Daubert*, the Tenth Circuit explicitly adopted the reasoning of the district court. *Id.* at 1410. In its opinion, reported at 879 F. Supp. 1078, that court found that the expert's "conclusory opinion lack[ed] a reliable factual basis, an acceptable methodology, and the necessary validation." *Id.* at 1084. The expert, who relied upon his own experience with bicycles, a conversation with a bicycle retail dealer, and his own rudimentary testing conducted on a hill, failed to employ the methodology or analysis that would have been employed by a reasonable bicycle manufacturer in reaching his conclusion. *Id.* at 1086. Thus, in *Duffee*, the Tenth Circuit expressly approved the application of *Daubert* to the testimony of an engineer who relied on his own experience.

Milner's testimony certainly would have been excluded under *Duffee:* Milner had done no testing and had no experience as a designer of tire changers. He, like the *Duffee* expert, was but a dilettante in a specialized field.

The direct conflict between the circuits portrayed by petitioners[1] collapses like a house of cards upon close inspection. *McCollock* establishes that there is no support for petitioner's contention that the Second Circuit "refuses" to apply the *Daubert* reliability requirement to expert engineering testimony. Although the Tenth Circuit's decision in *Compton* is an aberration

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1. Petitioners also cite the Ninth Circuit's decision in *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266 (9th Cir. 1994), where the court stated that "*Daubert* was clearly confined to the evaluation of scientific testimony." *Id.* at 1270 n. 3. The Ninth Circuit has since stated in *Southland Sod Farms v. Stover Seed Co.*, 1997 U.S. App. LEXIS 4275 (9th Cir. Mar. 11, 1997), that "*Daubert's* holding applies to all expert testimony, not just testimony based on novel scientific methods." *Id.* at *23 n. 8.

compared to the overwhelming majority of other circuits which apply *Daubert* to expert engineering testimony[2], *Duffee* calls into question the continued validity of *Compton*. The result, therefore, is an intracircuit conflict which needs resolution by the Tenth Circuit.

Rather than a conflict between the circuits, therefore, petitioners at most have identified intracircuit conflicts within the Second and Tenth Circuits. Hennessy submits that intracircuit conflicts of this nature are not a proper basis for the exercise of this Court's certiorari power. As Justice Harlan once stated, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn., 541, 552 (1958) (*quoted in* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.6, at 176 (7th ed. 1993)).

Hennessy also submits that review of *Daubert* would be premature at this time. Too little time has passed since that ruling to expose fully the nuances of its meaning to the crucible of experience in the lower courts and to the critical analysis of commentators. As Justice Stevens has observed:

> It would be better of course if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretation of federal rules may help illuminate an issue before it is finally resolved and thus may play a constructive role in the

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2. *See Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1996); *Guillory v. Domtar Indus.*, 95 F.3d 1320 (5th Cir. 1996); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299 (6th Cir. 1997); *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996).

> lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may produce the most desirable result.

John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982). This Court, therefore, should deny the Petition.

II.

SUMMARY JUDGMENT WAS PROPERLY GRANTED FOR REASONS INDEPENDENT OF THE INADMISSIBILITY OF EXPERT TESTIMONY.

Numerous grounds independent of the inadmissibility of expert testimony supported the district court's grant of summary judgment in Hennessy's favor. Many of these grounds related to state law issues of products liability law and policy.

For example, because it was uncontroverted that the tire changer did not (i) cause Peitzmeier to "mismatch" incompatible tire and rim components; (ii) cause the tire to explode; or (iii) cause different or more serious injuries to Peitzmeier other than those he would have sustained in the same accident without a tire changer, Hennessy argued that petitioners' claim did not fit within either the language or policy of Nebraska's definition of a "defective and unreasonably dangerous" product. The district court agreed:

> In this case, the Court finds that the machine is not defective as a matter of law. It is safe for intended use. There is no evidence that the machine was defective or that the design caused the accident. *There is no evidence that*

> *the machine caused the explosion or the accident.* Peitzmeier caused the explosion by mismatching the tire and the wheel. The exploding tire/wheel assembly was the proximate cause of the accident not the tire changing machine. *The purpose of the machine is not to prevent a tire from exploding. The tire changing machine is not unreasonably dangerous.* If Peitzmeier had not mismatched the tire and the wheel, the accident would not have occurred. *The machine acted as a passive surface against which the tire/wheel assembly reacted when it exploded. Any flat surface, including the floor, would have created the same result. Imposing liability on the defendant would serve no purpose because the accident was caused by operator error.*

(Pet. App. 20a) (emphasis added). The district court also agreed with Hennessy that Nebraska law would not extend the crashworthiness doctrine to petitioners' claims:

> The plaintiffs also assert that the theory of crashworthiness or enhanced injury applies to this case. The Court disagrees. The manufacturer is only liable for the portion of damages caused by the defective design. *Kudlacek v. Fiat, S.p.A.*, 244 Neb. 822, 830, 509 N.W.2d 603, 610 (1994). The plaintiff must prove that his injuries were enhanced as a result of the defective design or in cases of indivisible injury that the alleged defect was a substantial factor in causing the

> enhanced injuries. *Id.* at 830-31, 509 N.W.2d at 610-11.
>
> In this case, the Court finds that the machine does not have a design defect. There is no evidence that if a different design had been used Peitzmeier's injuries would have been reduced.

(Pet. App. 20a-21a). With the crashworthiness doctrine unavailable, Petitioners could not establish causation under Nebraska products liability law. In other words, because Peitzmeier was injured through contact with an exploding tire, which the tire changer did not cause to explode, petitioners had no cause of action under Nebraska law regardless of the admissibility of Milner's testimony.

Although the issue of the applicability of *Daubert*'s reliability requirement to expert engineering testimony and other purportedly non-scientific testimony is important, it is not central to the outcome below. As Justice Brennan once said:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the [conflict between the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). *See also* Stern, § 4.4, at 172.

The independent reasons for granting summary judgment

in favor of Hennessy demonstrate that this is not the "meaningful litigation" in which to provide any further clarification of *Daubert*.

III.

MILNER'S TESTIMONY WAS PROPERLY EXCLUDED UNDER *DAUBERT*.

Finally, review by this Court is not appropriate because the lower courts' application of the *Daubert* factors to exclude Milner's testimony was entirely correct.

Milner's testimony that the tire changer was defective was based on two interrelated concepts. First, he believed that the tire changer's platform and clamping system presented a risk of operator injury because an exploding tire could propel off the "launch pad" and would not be restrained by the clamps. Second, he opined that the way to reduce this risk of injury was to incorporate safety devices that he had conceptualized, but had not designed, built, tested, or shown to other engineers.

Even assuming petitioners are correct that Milner's "training and experience" alone informed his analysis of the "risk created by" the tire changer's platform and clamping system, the district court would have erred had it admitted his testimony on that basis. Under Nebraska law, a manufacturer does not have a duty to design a "risk-free" product, only one that is *reasonably* safe. *Hancock v. Paccar, Inc.*, 283 N.W. 2d 25, 40 (Neb. 1979). Milner's testimony about the performance and benefits of his conceptual safety devices was central to the issue of whether the product was "unreasonably" dangerous, and it appropriately became the focus of the district court's "gatekeeping" analysis.

Petitioners' analogy to the hypothetical expert who believes

cellular phones cause brain cancer, *see* Petition at 23, says much about their decision to seek review in this case. In that hypothetical, petitioners agree that application of the *Daubert* factors would be appropriate; otherwise, the trial judge would not know whether the expert's opinion was supported by accepted scientific methodology or by the expert's "subjective, unsupported belief." Petition at 23. Implicit in petitioners' hypothetical is the acknowledgment that *Daubert's* "reliability" factors *must be applied when the expert's opinion cannot be informed by training and experience,* regardless whether the subject matter of the expert's testimony is "technical," "specialized" or "scientific" knowledge.[3]

Milner's training and experience, however, did not permit him to speculate about proposed tire changer designs, and his design concepts were subjected to none of the intellectual rigors of the mechanical engineering profession. The district court, therefore, applied the *Daubert* factors as the only available means to assess the validity of Milner's design defect opinions, and did so properly.

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3. Petitioners contend that "engineering" is not "science" for *Daubert* purposes. There is no basis for such an artificial distinction. The mechanical engineering of products and medical research of the type at issue in *Daubert* both depend heavily upon repeated testing and review as part of the process of validation in the real world. Requiring an expert witness to adhere to "the same standards of intellectual rigor that are demanded in his or her professional work [outside the courtroom]," *Tyus,* 102 F.3d at 262, is what *Daubert* is all about. It is here where Milner, and the medical researchers in *Daubert* itself, failed.

CONCLUSION

For the reasons set forth above, Hennessy respectfully requests that the petition be denied.

Respectfully submitted,

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